

REYNOLD ALLGOOD, et al.,	:	Order Affirming Trespass Notices
Appellants	:	as Modified
	:	
v.	:	
	:	Docket No. IBIA 96-42-A
PORTLAND AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	April 5, 1996

This is an appeal from December 12, 1995, trespass notices issued by the Portland Area Director, Bureau of Indian Affairs. The notices informed appellants Reynold Allgood, Lorna Boykin, Robert Hammer, Mr. and Mrs. Jerry Nickel, Velma Tompkins, and Warren Staats that they were in trespass upon land held in trust for Indians and directed them to remove improvements from that land. The notices also stated that appellants were liable for trespass damages but postponed actual assessment of damages until a later time.

The trespass notices were issued after the Interior Board of Land Appeals (IBLA) affirmed a Bureau of Land Management dependent resurvey which determined the location of Nez Perce Allotments 1417a and 1442a. Lorna L. Boykin, 130 IBLA 301 (1994). The resurvey determined that the land upon which appellants' improvements are located are within Nez Perce Allotment 1417a, which is held in trust for the Indian heirs of Thomas Powers, the original allottee.

With the exceptions noted below, each of the trespass notices issued by the Area Director stated, in part:

The IBLA decision is now final for the Department of the Interior.

The Secretary retains, however, the authority to take jurisdiction over the matter and reverse or remand the matter for further proceedings. 43 CFR § 4.5. Such action is extremely rare and the Secretary has asserted his authority only when it was abundantly clear that an administrative body acted in an arbitrary and capricious manner. Nevertheless, the Department is willing to respond to any written submission you may provide within thirty days following issuance of this trespass notice. You should submit any such request directly to the Secretary in Washington, D.C.

You also may appeal this notice under 25 C.F.R. Part 2. * * * This right of appeal is separate from the 30 day period during which the Secretary's office will entertain any additional arguments you have regarding the correctness of the 1994 IBLA decision.

Notice is hereby given that you have 120 days following receipt of this letter to remove any and all improvements from the above-referenced site. Failure to remove the improvements from this site within the 120 day period will be considered an abandonment of the improvements, and thereafter title to any remaining improvements will be claimed by the United States on behalf of the beneficial owners of the land. Submission of any material to the Secretary will not affect this 120 day deadline. [1/]

You are also liable for damages for the period of the trespass. The amount of damages will be assessed upon the Department's review and response to any material submitted within the thirty day period prescribed above.

The Board received appellants' notice of appeal on January 16, 1996. On February 2, 1996, the Indian heirs filed various objections as well as a request that the Board expedite consideration of the appeal and/or require appellants to post an appeal bond.

On February 14, 1996, after receipt of the administrative record, the Board issued an order which, among other things, vacated the Area Director's trespass notices insofar as they stated that appellants were liable for trespass damages 2/ and ordered appellants to show why the remainder of the notices should not be summarily affirmed.

Appellants' response was received by the Board on April 1, 1996. Appellants state that, on January 16, 1996, they requested the Secretary to take jurisdiction, under 43 CFR 4.5(a)(2), over "the case pending in the Department" (Appellants' Statement at 2). Appellants' citation to subsection 4.5(a)(2) suggests that, despite their reference to a "pending"

1/ The notice sent to appellant Jerry Micka stated:

"Notice is hereby given that you have 30 days following receipt of this letter to stop using this illegal access or apply to this office for an approved easement. Failure to remove any improvements from this site within the 30 day period will be considered an abandonment of the improvements, and thereafter title to any remaining improvements will be claimed by the United States on behalf of the beneficial owners of the land. Submission of any material to the Secretary will not affect this 30 day deadline."

A letter to Mr. and Mrs. Tony Snyder included this same paragraph. The Snyders have not appealed.

The record does not include a copy of a trespass notice sent to appellant Velma Tompkins. 2/ This was done for procedural reasons, to ensure that the entire question of trespass damages would be considered in an orderly manner and by a single appellate forum. The Board expects that, when and if the contemplated assessments of damages are issued, the notices of assessment will reinstate the vacated portions of the Dec. 12, 1995, trespass notices--i.e., the statements that appellants are liable for damages.

case, they have requested the Secretary to review the already-decided Boykin case as well as to assume jurisdiction over the present appeal. 3/

Appellants submit a March 18, 1996, letter which they received from an attorney in the Solicitor's Office. The letter states: "The Department is reviewing the material you submitted. Should further briefing be required, we will contact both you and the attorney for the allottees." The letter also directs appellants to serve their submissions upon counsel for the Indian heirs. This letter, although noncommittal, suggests at least the possibility that the Secretary will decide to review the IBLA decision in Boykin.

Appellants argue that the Board should not dispose of this appeal until the Secretary has issued a final decision on the ownership issue. Further, they contend that they should be allowed at least 12 weeks after the issuance of the Secretary's decision to remove their improvements, should the Secretary rule against them.

Appellants do not contend that any issue, other than the time for removal of improvements, remains to be litigated in this appeal.

In the interest of fairness to both appellants and the Indian heirs, and in order to promote orderly decisionmaking within the Department, the Board finds that it should summarily affirm the Area Director's trespass notices insofar as they required appellants to vacate and remove improvements from Nez Perce Allotment 1417a, but that it should modify the notices in the following respects: (1) for the purpose of removing permanent improvements, appellants are allowed a period of 90 days, which will start to run upon appellants' receipt of either (a) the Secretary's determination not to review the IBLA decision in Boykin or (b) the Secretary's decision affirming the IBLA decision in Boykin; (2) appellants who have not made permanent improvements are allowed a period of 30 days from receipt of either Secretarial decision mentioned in (1) to vacate the property; (3) should the Secretary direct IBLA to reconsider its decision in Boykin, and should IBLA reaffirm its original decision, the 90-day and 30-day periods will begin to run upon appellants' receipt of the IBLA decision upon reconsideration; and (4) should the Secretary or IBLA reverse the original

3/ 43 CFR 4.5(a) provides in relevant part:

"Nothing in this part shall be construed to deprive the Secretary of any power conferred upon him by law. The authority reserved to the Secretary includes, but is not limited to:

"(1) The authority to take jurisdiction at any stage of any case before any employee or employees of the Department, including any administrative law judge or board of the office [of Hearings and Appeals] * * * and render the final decision in the matter after holding such hearing as may be required by law; and

"(2) The authority to review any decision of any employee or employees of the Department, including any administrative law judge or board of the Office, or to direct any such employee or employees to reconsider a decision * * *."

decision in Boykin, the Area Director's trespass notices will be rendered ineffective and this order will be rendered moot.

As noted above, the Board has already vacated the Area Director's trespass notices insofar as they stated that appellants are liable for trespass damages.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's December 12, 1995, trespass notices are affirmed as modified in this order.

Anita Vogt
Administrative Judge

Kathryn A. Lynn
Chief Administrative Judge